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January 22, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 28, 2009

Case Number: TSO-0798

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization ¹/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should be restored.

I. Background

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. During a background investigation, the local DOE security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in Personnel Security Interviews (PSIs) in order to resolve the information. The PSIs did not resolve the security concerns.

On June 19, 2009, the local DOE security office (LSO) sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of one potentially disqualifying

¹/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L). 2/

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual testified on his own behalf. The DOE Counsel did not present any witnesses. The individual and the DOE submitted a number of written exhibits prior to and during the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring her access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly

2/ Criterion L relates, in relevant part, to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security" 10 C.F.R. § 710.8(l).

consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As stated above, the LSO cites one disqualifying criterion as a basis for suspending the individual's security clearance, Criterion L. The LSO's Criterion L concerns are predicated on the individual's admission that he has not filed his state and federal taxes for years 2005 through 2008, as well as his admission to being delinquent on four mortgage accounts, totaling over \$300,000. These admissions raise concerns about the individual's vulnerability to blackmail, exploitation, and duress which call into question the individual's judgment, reliability, trustworthiness and her ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

The relevant facts in this case are uncontested. In 2007, as part of a background investigation, the LSO conducted a PSI of the individual to address his financial problems. During this interview, the individual admitted that he had not filed his state and federal taxes for four years, 2005 through 2008. DOE Exh. 2. According to the individual, he did not file his taxes because he had to care for his ill mother and had not had time to gather the paperwork to file. *Id.* During this interview, the individual further stated that he would try to file his 2004 and 2005 state and federal taxes as quickly as possible. However, he did not file his 2005 taxes. In addition, during a 2009 PSI, the individual admitted to being delinquent on four mortgage accounts on two investment properties, totaling over \$300,000. *Id.* The individual also admitted that he stopped making payments on his two investment properties in September 2008 because he could not afford to keep making the payments from his savings. *Id.* The individual further revealed that the two properties are in the process of foreclosure. *Id.*

V. Hearing Officer Evaluation of the Evidence

I have thoroughly considered the record in this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c). 3/

During the hearing, the individual testified that he is now in complete compliance with his federal and state taxes and submitted as documentary evidence the completed tax returns for years 2004

3/ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence of rehabilitation or reformation or other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

through 2008. Transcript of Hearing (Tr.) at 11 and 12. He testified that on each of the tax returns, there were no taxes owed, but rather that there are outstanding refunds due to him totaling approximately \$25,000. *Id.* The individual further testified that there were no complaints or penalties assessed as the result of his late filing of his returns and that he filed for extensions for each relevant tax year. *Id.* at 12 and 53. When questioned as to why he fell behind in filing his tax returns, the individual explained that his investment decisions complicated his tax returns while personal circumstances created a lot of time pressures for him. *Id.* at 23. The individual testified that he had three different properties as well as securities on which to retrieve tax information and that this information was in disarray and took a period of time to retrieve. *Id.* Specifically, he stated that in order to keep up with mortgage payments, he sold some of his mutual funds which had quarterly statements dating back to the seventies. The individual testified that for him to arrive at the cost basis for these assets, he had to retrieve pertinent information from the seventies through 2005. *Id.* at 23. He reiterated that these records were in disarray because of a previous move. *Id.* The individual testified that he contacted the companies for the cost basis information, but was informed that they do not maintain information for mutual funds dating back that long ago. *Id.* at 25. He stated that in order to complete his return, he made estimates on about nine of the quarterly statements that he was unable to retrieve. *Id.* at 24. According to the individual, who currently has substantial investments in securities, he can now establish the cost basis of his securities easily because his accounts are held in electronic form and statements are easily retrievable from the companies on the Internet. *Id.* at 25. He testified that he cannot foresee any other reason in the future that he would ever have difficulty establishing the cost basis for any of his investments. *Id.*

The individual also explained that he had personal problems in his life that affected the late filing of his taxes. *Id.* He testified that his mother had a stroke in April 2005 which was during tax season and at the time he was attempting to complete his 2004 taxes. He explained that as a result of the stroke, his mother was impaired in a wheelchair with brain, visual and mobility issues and required 24-hour care. *Id.* at 26-28. As the only relative in the immediate vicinity, the individual testified that he took full responsibility for his mother which included moving with his mother and attending to her basic needs. *Id.* at 27.

The individual further testified about the delinquencies on mortgage accounts on two condominiums he owned. The individual stated that in April 2005, he purchased two condominiums after attending an investment seminar. He testified that he was assured that the properties were in “good” area with increasing value, and further that the properties would produce positive cash flow. *Id.* at 20. He further explained that he intended to rent these properties. However, after the purchase of the properties, the real estate market dropped significantly and he was unable to rent the properties on a cash flow basis. *Id.* at 21. He explained that the renter of the first property moved after the first month and bouncing her first rental check, and that other property was rented on a negative cash flow basis. *Id.* The individual testified that he continued to pay the mortgages and other obligations on these properties until August 2008, at which time he made a business decision to let the properties go into foreclosure and absorb the loss associated with foreclosure. *Id.* The individual explained that he made this decision because he did not see, at anytime in the near future, that these properties would be able to produce a positive cash flow or be sold in the current market. *Id.* According to the individual, he has no continuing liability or responsibility for the mortgages on these properties. *Id.*

at 22. He testified that he has not been contacted by anyone with respect to payment of any monies on those mortgages or attorneys' fees since August 2008.

In describing his current financial condition, the individual testified that he owns two homes, one of which has a mortgage on it that is current. *Id.* at 13. The individual testified that the mortgage on the other home is paid off. In addition to these two houses, the individual stated that he owns 177 acres of land that has no mortgage and is completely paid off, as well as a rental property. *Id.* at 14. The individual testified that, in total, he has about \$453,000 equity in real property. *Id.* at 16. He also testified to and presented documentary evidence of his securities and bank account balances which, added to his real estate equity leaves the individual with a significant net worth. *Id.* at 19. According to the individual, he has no outstanding loans and, other than his mortgage, he is completely debt-free. *Id.*

Finally, during the hearing, the individual testified that he fully understands his duty and obligation to file his taxes in a timely manner and expressed remorse for not filing his taxes earlier. *Id.* at 54 and 58. He further testified that he is not at any risk of not complying with his tax obligations to file timely tax returns in the future. He reiterated that his mother's health care concerns are now under control and that he has organized his investment records to more readily retrieve information for future tax filings. *Id.* With respect to his foreclosed properties, the individual testified that he tried to pursue other alternatives, including talking to several real estate agents about selling the properties, before realizing these options were not viable and deciding to allow the properties to go into foreclosure. *Id.* at 49. He testified that he takes the responsibility to pay his debts seriously. *Id.* at 31.

After considering all of the evidence before me, I find that the individual has mitigated the security concerns arising from his late tax filings, as well as the delinquent mortgage accounts on two investment properties. As stated above, the individual has resolved delinquency issues related to his investment properties and has brought all of his taxes to a current status. He has filed all of his outstanding tax returns and is now in full compliance with his state and federal taxes. During the hearing, the individual convincingly testified that he understands his obligation to file his tax returns in a timely fashion and expressed sincere remorse for not having done so. The individual demonstrated through both his testimony and documentary evidence that there were significant personal issues occurring in his life that contributed to this situation. I am convinced that the individual's caregiving responsibilities for his mother overwhelmed him and contributed to his inability to address his tax returns in a timely fashion. He responsibly filed for extensions each year with the Internal Revenue Service and was not assessed any penalties for his late filings. Rather, the individual is owed a significant refund for the relevant tax years. I am convinced that the individual will meet his tax obligations in the future. In addition, I am also convinced that the individual has learned a valuable lesson about buying speculative investment property and is not at risk of being in a similar position in the future. I am persuaded by the individual's testimony that he takes his obligation to pay his debt seriously and that he responsibly considered other alternatives before allowing these investment properties to go into foreclosure. After considering the "whole person," I am convinced that the DOE can rely on the individual's ability to make sound judgment calls

regarding the safeguarding of classified information. *See* Adjudicative Guidelines at (2)a. I therefore find that the individual has sufficiently mitigated the LSO's concerns under Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criterion L. I therefore find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: January 22, 2010